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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 80-5644

DAVID PEEK,

Petitioner,

-against-

SUPERIOR COURT OF
BUTTS COUNTY, GEORGIA,

Respondent.

MOTION TO PROCEED IN FORMA PAUPERIS

The Petitioner, DAVID PEEK, by his undersigned counsel, asks leave to file the attached Petition for Writ of Certiorari to the Superior Court of Butts County, Georgia, without prepaymentment of costs and to proceed in forma pauperis, pursuant to Rule 46. Counsel's Affidavit in support of this motion is annexed.

Scott McLarty

SCOTT McLARTY
118 East Maple Street
Decatur, Georgia 30030
(404) 377-0254

ATTORNEY FOR PETITIONER

STATE OF GEORGIA

COUNTY OF DEKALB

COUNSEL'S AFFIDAVIT

Before the undersigned, an officer duly authorized by law to administer oaths, appeared SCOTT McLARTY, who, being duly sworn, deposes and says as follows:

I am a member in good standing of the Bar of the State of Georgia;

I am an attorney of record for Petitioner, DAVID PEEK;

I have agreed to represent Petitioner without fee or remuneration of any kind;

I have investigated Petitioner's financial circumstances and have determined that he is without the funds necessary to bring this action;

I have made this affidavit because there is insufficient time in which to obtain Petitioner's Affidavit of Poverty;

Petitioner is currently incarcerated under the custody of the State of Georgia at the Georgia Diagnostic and Classification Center in Jackson, Georgia; and,

Petitioner's Affidavit of Poverty will be sent to this Court as soon as practical.

Scott McLarty

SCOTT McLARTY

ATTORNEY FOR PETITIONER

Sworn to and subscribed before me,
this the 30th of October, 1980.

Virginia S McLarty

Notary Public

My Commission expires:

October 5, 1982

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the within and foregoing "Petition for Writ of Certiorari and motion to proceed in Forma Pauperis. Arthur Bolton, Attorney General, State of Georgia, 132 State Judicial Building, Atlanta, Georgia 30334, by depositing a copy of same in the United States Mail, first-class postage affixed thereto.

This the 30th day of October, 1980.

Scott McLarty

SCOTT McLARTY
ATTORNEY FOR PETITIONER

118 East Maple Street
Decatur, Georgia 30030
404-377-0254

IN THE

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DAVID PEEK,

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V.

WALTER ZANT,

Respondent

PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME COURT OF GEORGIA

COUNSEL FOR PETITIONER:

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118 East Maple Street
Decatur, Georgia 30030
404-377-0254

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American Civil Liberties
Union Foundation
52 Fairlie Street, N. W.
Atlanta, Georgia 30303
404-523-2721

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

NO.

DAVIE PEEK,

Petitioner

V.

WALTER ZANT, Respondent

PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME COURT OF GEORGIA

Petitioner prays that writs of certiorari issue to review the judgments of the Supreme Court of Georgia entered on September 6, 1977, July 16, 1980, and August 1, 1980.

CITIATIONS TO OPINIONS BELOW

The opinions of the Georgia Supreme Court are reported in Peek v. State 239 Ga. 422, 238 S. C. 2d 12 (1977) and Peek v. Zant, Denial of certificate of probable cause entered on July 16, 1980.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U. S. C. § 1257 (3), Petitioner having asserted below and asserts in this Court deprivation of rights secured by the Constitution of the United States.

QUESTIONS PRESENTED

-1-

Whether the State of Georgia provides a Constitutionally adequate forum for the investigation and review of federal constitutional claims by Death Row inmates in Georgia.

-2-

Whether the penalty of death can be applied against an indigent defendant in the absence of a complete record and transcript, where the defendant properly moved, and the trial court ordered, a complete recordation of the proceedings, and whether the State Supreme Court could have determined, on initial review, whether the sentence of death was imposed arbitraily or capriciously, in the absence of said record.

-3-

Whether the refusal of the Georgia Supreme Court to review the habeas trial courts decision, (which utterly begs the Georgia Supreme Court to review and reverse it) violates petitioners right to a full and complete review of his federal constitutional claims in a state proceeding.

HOW THE ISSUES WERE RAISED BELOW

-1-

Petitioner filed a petition for writ of habeas corpus in Butts County, Georgia, and in the habeas court's order, serious and substantive constitutional claims were raised and discussed. The Supreme Court of Georgia denied Petitioner's certificate of probable cause to appeal despite the habeas court's clear, unambiguous doubts that petitioners' conviction and sentence were constitutionally Sound. Upon motion for rehearing, Petitioner alleged that he would be denied an adequate review of his federal constitutional claims unless the Georgia Supreme Court reviewed the habeas court order. This motion was denied.

-2-

Petitioners challenge to the absence of a complete record was first raised in his state habeas petition, and despite clear and unambiguous doubts expressed by the habeas court in its order regarding the Constitutionality of petitioners conviction and sentence, the Georgia Supreme Court denied a certificate of probable cause and refused to review pettioners' claims.

-3-

The petitioners' claim that the State of Georgia denied his right to a full and complete review of his federal constitutional claims was first raised in his state habeas petition. His motion for appointment and compensation of counsel to assist him in the presentation of these claims was also raised for the first time in his habeas petition.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States, and the privileges and immunities clause therein.

2. This case also involves the following provisions of the Code of Georgia:

Ga. Code Ann. Section 26-3102

> "Capital offenses; jury verdict and sentence. Where, upon a trial by jury, a person is convicted of an offense which may be punishable by death, a sentence of death shall not be imposed unless the jury verdict includes a finding of at least one statutory aggravating circumstance and a recommendation that such sentence be imposed. Where a statutory aggravating circumstance is found and a recommendation of death is made, the court shall sentence the defendant to death. Where a sentence of death is not recommended by the jury, the court shall sentence the defendant to imprisonment as provided by law. Unless the jury trying the case makes a finding of at least one statutory aggravating circumstance and recommends the death sentence in its verdict, the court shall not sentence the defendant to death, provided that no such finding of statutory aggravating circumstance shall be necessary in offenses of treason or aircraft hijacking. The provisions of this section shall not affect a sentence when the case is tried without a jury or when the judge accepts a plea of guilty."

Ga. Code Ann. Section 27-2537

"Review of death sentences. (a) Whenever the death penalty is imposed, and upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the Supreme Court of Georgia. The clerk of the trial court, within ten(10) days after receiving the transcript, shall transmit the entire record and transcript to the Supreme Court of Georgia together with a notice prepared by the clerk and a report prepared by the trial judge. The notice shall set forth the title and docket number of the case, the name of the defendant and the name and address of his attorney, a narrative statement of the judgment, the offense, and the punishment prescribed. The report shall be in the form of a standard questionnaire prepared and supplied by the Supreme Court of Georgia.

(b) The supreme Court of Georgia shall consider the punishment as well as any errors enumerated by way of appeal.

(c) With regard to the sentence, the court shall determine:

(1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, and

(2) Whether, in cases other than treason or aircraft hijacking, the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in Code Section 27-2534. 1(b), and

(3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

(d) Both the defendant and the State shall have the right to submit briefs within the time provided by the court, and to present oral argument to the court.

(e) The court shall include in its decision a reference to those similar cases which it took into consideration. In addition to its authority regarding correction of errors, the court, with regard to review of death sentences, shall be authorized to:

(1) Affirm the sentence of death; or

(2) Set the sentence aside and remand the case for resentencing by the trial judge based on the record and argument of counsel. The records of those similar cases referred to by the Supreme Court of Georgia in its decision, and the extracts prepared as hereinafter provided to the resentencing judge for his consideration.

(f) There shall be an Assistant to the Supreme Court, who shall be an attorney appointed by the Chief Justice of Georgia and who shall serve at the pleasure of the court. The court shall accumulate the records of all capital felony cases in which sentence was imposed after January 1, 1970, or such earlier date as the court may deem appropriate. The Assistant shall provide the court with whatever extracted information it desires with respect thereto, including but not limited to a synopsis or brief of the facts in the record concerning the crime and the defendant.

(g) The court shall be authorized to employ an appropriate staff and such methods to compile such data as are deemed by the Chief Justice to be appropriate and relevant to the statutory questions concerning the validity of the sentence.

(h) The office of the Assistant shall be attached to the office of the Clerk of the Supreme Court of Georgia for administrative purposes.

(i) The sentence review shall be in addition to direct appeal, if taken, and the review and appeal shall be consolidated for consideration. The court shall render its decision on legal errors enumerated, the factual substantiation of the verdict, and the validity of the sentence.

Ga. Code Ann. Section 50-127

Exclusive procedure for suing out a writ of habeas corpus for persons whose liberty is being restrained by virtue of a sentence imposed against them by a State court of record

Notwithstanding the other provisions of this Title, the following is the exclusive procedure for suing out a writ of habeas corpus for persons whose liberty is being restrained by virtue of a sentence imposed against them by a State court of record:

(1) Grounds for writ.--

Any person imprisoned by virtue of a sentence imposed by a State court of record who asserts that in the proceedings which resulted in his conviction there was a substantial denial of his rights under the Constitution of the United States or of the State of Georgia or the laws of the State of Georgia may institute a proceeding under this section. Except for objections relating to the composition of a grand or traverse jury, rights conferred or secured by the Constitution of the United States shall not be deemed to have been waived unless it is shown that there was an intentional relinquishment or abandonment was participated in by the party and was done voluntarily, knowingly, and intelligently. The right to object to the composition of the grand or traverse jury will be deemed waived under this Section, unless the person challenging the sentence shows in the petition and satisfies the court that cause exists for his being allowed to pursue the objection after the conviction and sentence has otherwise become final.

(2) Petition and verification.-

The petition shall identify the proceeding in which the petitioner was convicted, give the date of rendition of the final judgment complained of, and clearly set forth the respects in which petitioner's rights were violated. The petition shall have attached thereto affidavits, records, or other evidence supporting its allegations or shall state why the same are not attached. The petition shall identify any previous proceedings that petitioner may have taken to secure relief from conviction. Argument and citations of authorities shall be omitted from the petition. The petition must be verified by the oath of the applicant or some other person in his behalf.

(3) Jurisdiction and venue.-

The petition must be filed in the superior court of the county wherein the petitioner is being detained. The superior courts of such counties have exclusive jurisdiction of habeas corpus actions arising under this section.

(4) Service of the petition.-

Service of the petition shall be made upon the person having custody of the petitioner. If the petitioner is being detained under the custody of the Board of Corrections, an additional copy of the petition shall be served on the Attorney General; however, if the petitioner is being detained under the custody of some other authority other than the Board of Corrections, and additional copy of the petition shall be served upon the solicitor general of the county wherein the petition is filed. Service upon the Attorney General or the

solictor general may be had by mailing a copy of the petition along with a proper certificate of service.

(5) Custody of pettioner.-

Custody and control of the petitioner shall be retained by the Board of Corrections or other authority having custody of the petitioner and it shall be the duty of such board or authority to produce the petitioner at such times and places as the court may direct.

(6) Proceedings on petition.-

Within 20 days after filing and docketing of the petition, or within such further time as the court may set, the respondent shall answer or move to dismiss the petition. The court shall set the case for a hearing on the issues within a reasonable time after the filing of defensive pleadings.

(7) Disposition in the trial court.-

(a) The court may receive proof by depositions, oral testimony, sworn affidavits, or other evidence.

(b) The taking of depositions or depositions upon written questions, by either party, shall be governed by the provisions of sections 82A-126 through 81A-132 and and-81A-137: Provided, however, that the time allowed in section 81-A131 for service of cross-questions upon all other parties shall be 10 days from the date the notice and written questions are served.

(c) If sworn affidavits are intended by either party to be introduced into evidence, the party intending to introduce the affidavit shall cause it to be served upon the opposing party at least five days in advance of the date set for a hearing in the case. The affidavit so served shall be accompanied by a notice of the party's intention to introduce it into evidence. The superior court judge considering the petition for writ of habeas corpus may resolve disputed issues of fact upon the basis of sworn affidavits standing by themselves.

(d) If the court finds in favor of the petitioner, it shall enter an appropriate order with respect to the judgment or sentence challenged in the proceeding and such supplementary orders as to rearraignment, retrial, custody, or discharge as may be necessary and proper. In all cases the court shall dispose of the matter as law and justice require.

(8) Transcribing proceedings.-

All trials held under this section shall be transcribed by a court reporter designated by the superior court hearing the case.

(9) Judge's findings of fact and conclusions of law.-

After reviewing the pleadings and evidence offered at the trial of the case, the judge of the superior court hearing the case shall make written findings of fact and conclusions of law upon which the judgment is based. Such findings of fact and conclusions of law shall be recorded as part ot the record of the case.

(10) Subsequent petitions-waiver of grounds not claimed.-

All grounds for relief claimed by a petitioner for a writ of habeas corpus shall be raised by a petitioner in his original or amemded petition. Any grounds not so raised are waived unless the Constitution of the United States or of the State of Georgia otherwise requires, or any judge to whom the petition is assigned, on considering a subsequent petition, finds grounds for relief asserted therein which could not reasonably have been raised in the original or amended petition.

(11) Practice as to appeals.-

(a) Appeals in habeas corpus cases shall be governed by the Appellate Procedure Act of 1965(§6-701 et seq.), except that as to final orders of the court which are adverse to the petitioner, no appeal shall be allowed unless a justice of the Supreme Court of Georgia shall issue a certificate of probalbe cause for such appeal.

(b) Within 30 days from the entry of the order denying relief to the petitioner, a written application for a certificate of probable cause to appeal must be filed with the clerk of the Supreme Court of Georgia, if the unsuccessful petitioner desires to appeal. The petitioner shall also file, within the same period, a notice of appeal with the clerk of the concerned superior court. A justice of said appellate court shall either grant or deny the application within a resonable time after filing. So the justice may fully consider the request for a certificate, the clerk of the concerned superior court shall forward as in other case, the record and transcript if designated, t the clerk of the Supreme Court of Georgia when a notice of appeal is filed. The clerk of the concerned superior court need not prepare and retain and the court reporter need not file, a copy of the original record and a copy of the original transcript of proceedings. The clerk of the Supreme Court of Georgia shall return the original record and transcript to the clerk of the concerned superior court upon completion of the appeal if the certificate is granted. If the Justice of the Supreme Court of Georgia denies the application for a certificate of probable cause, the clerk of the Supreme Court of Georgia shall return the original record and transcript and notify the clerk of the concerned superior court and the parties to the proceedings below of the determination that probable cause does not exist for appeal.

(c) If the trial court finds in favor of the petitioner, no certificate of probable cause need be obtained by the respondent as a condition precedent to appeal. A notice of appeal filed by the respondent shall act as a supersedeas and stay the judgment of the superior court until there is a final adjudication by the appellate court: Provided, however, that while such case is on appeal, the petitioner may be released on bail as is now provided for in criminal cases, except where the petitioner has been convicted of a crime over which the Supreme Court of Georgia has jurisdiction to consider on direct appeal. The right to bail and the amount of bond shall be within the discretion of the judge of the superior court where the sentence sucessfully challanged under this Chapter was originally imposed.

Ga. Code Ann. Section 59-910

Same; substitution of alternate for original juror

If at any time, whether before or after final submission of the case to the jury, a juror dies or becomes ill, or upon other good cause shown to the court is found to be unable to perform his duty, or is discharged for other legal cause, the first alternate juror shall take the place of the first juror becoming incapacitated and further replacements shall be made in similar numerical sequence: Provided, said alternate jurors have not been discharged. Such jurors, so taking the place of any incapacitated juror, shall thereafter be deemed to be a member of the jury of 12, and shall have full power to take part in the deliberations of the jury, and the finding of the verdict. Any verdict found by any such jury, having thereon alternates, shall have the same force, effect and validity as if found by the original jury of 12.
(Acts 1968, pp. 1225, 1227.)

STATEMENT OF THE CASE

Petitioner was found guilty on two counts of murder and one count of kidnapping on July 26, 1976 in the Superior Court of Greene County, Georgia. He was sentenced to death on the convictions of each count of murder and also received the death sentence on the kidnapping charge. Petitioner was represented by appointed counsel.

On September 6, 1977, the Supreme Court of Georgia affirmed his convictions and Sentences of death for murder, and affirmed his conviction for kidnapping, while reversing the sentence of death imposed on this count, Peek v. State239 Ga. 422, 238 S. E. 2d 12 (1977), cert.denied, _____U. S. _____ (1978).

On March 12, 1979 Petitioner initiated a petition for writ of Habeas Corpus in the Superior Court of Butts County, Georgia. On March 31, 1980, an order was entered in the Superior Court of Butts County, Georgia, denying petitioner the relief which he sought. A copy of this order is attatched to this petition as Exhibit""A".

On July 16, 1980, Petitioners Application for Certificate of Probable Cause was denied in the Supreme Court of Georgia, and on August 1, 1980 Petitioners Motion for rehearing was denied.

The facts underlying Petitioners conviction are not seriously contested in this proceeding, however, the factual posture of the case can be ascertained in Peek v. State, Supra.

This petition focuses upon the standard of review of federal constitutional claims in death penalty cases in the State of Georgia This case should be granted certiorari at this time, prior to any federal habeas proceedings for petitoner because the possibility of petitioner availing himself of this remedy is highly speculative, inasmuch as petitioner is an indigent, poorly educated black man who was represented in his state habeas by counsel who sought, and was denied, compensation for expenses and investigation. To assume that Petitioner is aware of and will avail himself of his federal habeas corpus remedies is dangerously speculative; espacially so in light of the State

of Georgia's failure to adequately provide for counsel for Death Row inmates beyond their direct appeal.

I.

WHETHER THE STATE OF GEORGIA PROVIDES A CONSTITUTIONALLY ADEQUATE FORUM FOR THE INVESTIGATION AND REVIEW OF FEDERAL CONSTITUTIONAL CLAIMS BY DEATH ROW INMATES IN GEORGIA,

At the heart of this Courts' ruling in Gregg v. Georgia, 42 U. S. 153, 96 S. Ct. 2909 (1976) was the strict review provisions of the death penalty statuatory scheme to insure that the irrevocable sanction of death is not imposed in an arbitrary or capricious manner, or under the influence of passion, prejudice, or any other arbitrary factor. In outlining this Courts' (review of the statuatory scheme), the Court noted:

"A transcript and complete record of the trial, as well as a separate report by the trial judge are transmitted to the (Georgia Supreme) Court for its use in reviewing the sentence." Gregg at 165.

Petitioner Peek, through his appointed counsel, moved for complete recordation, and an order of sorts granted his motion. Nonetheless, no record of arguments or bench conferences was transmitted to the Georgia Supreme Court. (Habeas Court Order page 8.) The habeas trial court found serious federal constitutional defects in Petitioners conviction and sentence because of this incomplete record but was unable to reverse petitioners' case because of the Georgia Supreme Courts' "implicit decision" when it affirmed the death sentences on appeal. (Habeas Trial Court Order at page 9). The court then found substantial Federal Constitutional infirmaties (Order at pages 9-10), and concluded:

"This Court feels that Petitioner in this case should get a new trial because of this. But a habeas court must follow the law - not make law - and the present state of the law requires this Court to deny relief to Petitioner. See Davis v. State, supra.

This Court hopes the Supreme Court will adopt a rule similar to the one set forth above and reverse this Order. Justice would be well served if it would." (Habeas Trial Court Order at page 11.)

Thus, although Petitioner had clearly substantive federal constitutional claims, the Georgia Supreme Court refused to review the Habeas Courts decision. Indeed, the Georgia Supreme Court has adopted the position of consistently denying review of state habeas corpus proceedings in the past year. (See Exhibit"B', Appellate Review by the Georgia Supreme Court of the Denial of State Habeases.)

Petitioner urges this Court to grant certiorari to determine whether the State of Georgia provides an adequate forum for the investigation review, and correction of Federal Constitutional defects in a conviction.

That the State of Georgia is required to provide such a forum is clear. This Court has so ruled in Moony v. Holohan, 294 U. S. 103, 55 S. Ct. 340 (1934) and implicitly in Case v. Nebraska 381 U. S. 335,85 S. Ct. 1486 (1965).

Petitioner urges this Court to review the insufficiency of review by the Georgia Supreme Court, and to determine whether this insufficient review violates Petitioners rights to an adequate state forum for review and correction of federal constitutional issues, as secured by the Fourteenth Amendment to the United States Constitution.

WHETHER THE PENALTY OF DEATH CAN BE APPLIED AGAINST AN INDIGENT DEFENDANT IN THE ABSENCE OF A COMPLETE RECORD AND TRANSCRIPT, WHERE THE DEFENDANT PROPERLY MOVED, AND THE TRIAL COURT ORDERED, A COMPLETE RECORDATION OF THE PROCEEDINGS, AND WHETHER THE STATE SUPREME COURT COULD HAVE DETERMINED, ON INITIAL REVIEW, WHETHER THE SENTENCE OF DEATH WAS IMPOSED ARBITRAILY OR CAPRICIOUSLY, IN THE ABSENCE OF SAID RECORD.

The case presents the question of the adequacy of review by the Georgia Supreme Court, on direct appeal and upon appeal of this habeas case, of Petitioners convictions and sentences of death rendered in the Superior Court of Greene County, Georgia.

This Court, in declaring Georgias' Death Penalty Statute to be constitutional, Gregg v. Georgia 428 U. S. 153, 96 S. Ct. 2909 (1976)., noted that Furman v. Georgia 408 U. S. 238, 92 S. Ct. 2726 held that the death penalty could not be imposed "under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner." Gregg supra at 187. This Court voiced its approval of Georgias' statuatory scheme, but did so, in part, based upon "an important additional safeguard against arbitrariness and caprice,... an automatic appeal... That Court is required by statute to review each sentence of death and determine whether it was imposed under the influence of passion or prejudice." Gregg supra at 200.

Petitioners' conviction was rendered in Greene County, Georgia, an Ocmulgee Judicial Circuit Court. Ocmulgee Circuit has two per cent of the States population and 12 percent of its condemmed prisoners in the State. Prosecutor Joe Briley's reputation as an aggressive prosecutor is exemplified by his injection of irrelevant testimony the habeas hearing of December 14, 1979 (Second habeas transcript at pages 41-42). A perusal of Briley's testimony at the state habeas hearing reflects his aggressive nature.

There is always a possibility of inflammatory or prejudicial remarks during closing arguments in a case. This Court, in accepting Georgias' Statuatory scheme, no doubt found safeguards because the Georgia Supreme Court, with a complete record and transcript, must review death sentences to insure they are not arbitrarily and capriciously applied (emphasis mine) Gregg.

supra at 167.

The Georgia Supreme Court, when reviewing Petitioners' case on direct appeal, did so without a complete record and transcript. (Habeas Court Order at pages 8 and 9). The habeas court was unable to reverse Petitioners' convictions and sentences because the Georgia Supreme Court places the burden upon the defendant to show harm by the failure of the court reporter to transcribe arguments. Bowden v. Zant 244 Ga. 260, 262 (1979). Petitioner, an indigent, moved for complete recordation and an order was granted. To place the Bowden burden upon defendant is unrealistic, and the habeas trial court so found (Habeas Order at page 9). In the face of an order that clearly outlines constitutional deficiencies and calls upon the Georgia Supreme Court to review and reverse their earlier position, the Georgia Supreme Court denied a certificate of probable cause. The seriousness with which the Georgia Supreme Court takes its responsibilities to insure against arbitrariness and capriciousness must be drawn into question by Petitioners' treatment in the Georgia Supreme Court.

For these reasons, this court should review the question of whether the death penalty can be imposed against an indigent defendant in the absence of a complete record and transcript consistent with the Eight and Fourteenth Amendments to the United States Constitution.

WHETHER THE REFUSAL OF THE GEORGIA SUPREME COURT TO REVIEW THE HABEAS TRIAL COURTS DECISION, (WHICH UTTERLY BEGS THE GEORGIA SUPREME COURT TO REVIEW AND REVERSE IT) VIOLATES PETITIONERS RIGHT TO A FULL AND COMPLETE REVIEW OF HIS FEDERAL CONSTITUTIONAL CLAIMS IN A STATE PROCEEDING.

The United States Constitution obligates the state courts through the Fourteenth Amendment, to guard and enforce every right secured by the Federal Constitution. Mooney v. Holohan 294 U. S. 103 55 S. Ct. 340 (1935), Case v. Nebraska, 381 U. S. 336, 85 S. Ct. 1486 (1965).

Petitioners claims of violations of Federal Constitutional rights are neither frivolous nor inconsequential. The habeas court's decision (on pages 7-11) notes the overwhelming consti tutional deficieneies in petitioners' conviction and sentence, but also expresses the trial courts responsibility to follow the law, not make it. The Court goes on to "hope the Supreme Court will adopt a rule simialr to the one set forth above and reverse this Order. Justice would be well served if it would." (Habeas Court Order at page 11.)

In the face of this finding, rather than accept responsibility to review the case, the Georgia Supreme Court denied a certif-icate of probable cause to appeal.

Counsel for Petitioner concedes that an appropriate posture in most cases of this nature is to deny certiorari pending a determination of federal claims in federal habeas proceedings.

Petitioner respectfully urges upon this Court that to further litigate these Constitutional claims is unnecessarily duplicative and wasteful inasmuch as the Fourteenth Amendment of the United States requires the States to afford a method for reviewing and correcting Federal Constitutional Claims. Mooney v. Holohan,supra.

Clearly, a state courts' rulings on federal claims should be subject to federal review. A State, however, which takes its obligations to apply the United States Constitution seriously, should minimize the number of cases requiring federal court review.

Petitioner respectfully urges this Court to grant his Petition for Writ of Certiorari to determine whether the Georgia Supreme Court and the State of Georgia provide a sufficient forum to litigate his federal constitutional claims.

CONCLUSION

Petitioner prays that his petition for a writ of certiorari be granted.

Respectfully submitted,

SCOTT McLARTY
118 East Maple Street
Decatur, Georgia 30030
(404) 377-0254

NEIL BRADLEY
American Civil Liberties Union Foundation
52 Fairlie Street, N.W.
Atlanta, Georgia 30303
(404) 523-2721

SUPREME COURT OF GEORGIA

ATLANTA, July 16, 1980

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

DAVID PEEK V. WALTER D. ZANT, WARDEN

Upon consideration of the application for a certificate of probable cause to appeal filed in this case, it is ordered that it be hereby denied.

SUPREME COURT OF THE STATE OF GEORGIA,

CLERK'S OFFICE, ATLANTA,

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Joline B. Williams Clerk.

80-5644

IN THE SUPERIOR COURT OF BUTTS COUNTY

STATE OF GEORGIA

DAVID PEEK,	:	
	:	
PETITIONER	:	
	:	CIVIL ACTION
VS.	:	FILE NO. 4218
	:	
WALTER ZANT, WARDEN,	:	
GEORGIA DIAGNOSTIC AND	:	
CLASSIFICATION CENTER,	:	HABEAS CORPUS
	:	
RESPONDENT	:	

ORDER

Petitioner was convicted of two counts of Murder and one count of Kidnapping in the Superior Court of Greene County. He was sentenced to death on all counts. His convictions were affirmed and the imposition of the death penalty was affirmed as to the Murder counts. Peek v. State, 239 Ga. 422 (1977). Certiorari was denied by the Supreme Court of the United States. Peek v. Georgia, 439 U.S. 882, 58 L. Ed. 2d 194 (1978). This Petition for Habeas Corpus attacks the legality of Petitioner's convictions and the imposition of the death penalty on the Murder convictions. The Petition contains forty-one paragraphs, and the Court will rule on those paragraphs containing claims for relief by paragraphs corresponding numerically to the paragraphs in the Petition.

9., 10., 11.

In these paragraphs, Petitioner claims that

"EX. A" 1

his convictions and sentences imposed are unconstitutional because an alternate juror was substituted for a juror without a showing of good cause and in violation of his Sixth and Fourteenth Amendment rights.

After the jury had been deliberating for approximately three hours during the guilt/innocence phase of the trial, the foreman of the jury emerged from the jury room and told the judge that one of the jurors was sick, (Trial Transcript, pp. 231-232, Habeas Transcript, 4/5/79, pp. 18-29, 41, 43-45). This was not done on the record and apparently when Court was not formally in session. However, the prosecutor, defense counsel, and the sheriff were present and heard the conversation between the foreman and the judge. (Habeas Transcript, 4/5/79, pp. 92-94). The judge then announced for the record that a juror, who was misidentified as Mr. Geesling (his name was actually Mr. Greeson) was unable to continue. Both the district attorney and defense counsel agreed to excuse this juror and substitute the first alternate. (Trial Transcript, pp. 231-232, Habeas Transcript, 4/5/79, p. 94). The first alternate was sent to the jury room and a guilty verdict was returned a few minutes later.[1] (Trial Transcript, pp. 232-233). The law concerning

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[1] The record indicates that three minutes elapsed from the time the first alternate went into the jury room until the jury returned a verdict. The judge, district attorney, alternate, and foreman testified that approximately fifteen to thirty minutes elapsed. (Duke Deposition, p. 10, Habeas Transcript, 12/14/79, pp. 11-12, Habeas Transcript, 4/5/79, pp. 59, 69-71, 49).

substitution of a juror is as follows:

> "If at any time...a juror...becomes ill, or upon other good cause shown to the Court is found to be unable to perform his duty...the first alternate juror shall take the place of the ...juror becoming incapacitated..." Ga. Code Ann. §59-910.

Petitioner waived any right to object to the substitution when his counsel agreed to the same. (Trial Transcript, p. 232). But even if this were not the case, it was not error for the trial court to substitute the first alternate where it had been made to appear to the Court that a juror was ill and unable to continue. Tanner v. State, 242 Ga. 437, 438 (1978). Although there is disagreement concerning the length of time the jury deliberated with the substituted member, it is presumed that the alternate was able to cast an intelligent vote in the absence of some showing to the contrary. Although the ill juror may have had a reasonable doubt concerning the guilt of Petitioner (Habeas Transcript, 4/5/79, p. 28), he was not asserting that doubt in the form of a certain vote in the jury room but was, because of his physical and emotional condition, not participating in the deliberations at all. (Habeas Transcript, 4/5/79, pp. 18-20, 31-32, 39-41, 51-52). Accordingly, the replacement of juror Greeson with first alternate

Weinstein was done for good cause. The procedure followed complied with applicable Georgia statutes and did not violate any federal constitutional rights of Petitioner.

On the matter of the amount of time the jury with alternate Weinstein deliberated before the guilty verdict was returned, the Court attaches no legal significance to the issue. There is no requirement that a jury take any particular amount of time to deliberate, and alternate Weinstein testified that he went over the evidence with the other jurors. (Habeas Transcript, 4/5/79, pp. 60, 70-71).

Therefore, the Court finds the claim for relief embodied in paragraphs 9, 10, and 11 to be without merit.

12.

In paragraph 12, Petitioner claims his constitutional rights were violated because Mr. Weinstein, the alternate juror who ultimately sat on the jury that convicted him and sentenced him to death, was absent during part of the trial. While there is an indication at one point in the trial (Trial Transcript, p. 176) that Mr. Weinstein had left the courtroom, evidence at the habeas hearing established that this juror (at that time the first alternate) did not miss any of the proceedings but rather that the Court saw him leave (apparently to go to the bathroom) and

stopped the proceeding until he got back. (See Deposition of Honorable Joseph B. Duke, p. 15).

Accordingly, the allegations of paragraph 12 are not borne out factually by the record and are without merit.

13.

Paragraph 13 contains the claim that first alternate Weinstein "...was permitted to be dispersed during the trial..." in violation of Ga. Code Ann. §59-718.1.

Mr. Weinstein, an orthodox Jew, was allowed to go home for lunch because he could not eat the food to be served the jury at a local restaurant. (Habeas Transcript, 4/5/79, pp. 57-58). While it is true that a defendant in a capital case has the right to have the jury kept together, it is not error to allow dispersal of a juror where the same is agreed to by defendant's counsel. Mason v. State, 239 Ga. 538 (1977); Jones v. State, 243 Ga. 820, 823 (1979). Mr. Weinstein was given permission by the Court to go home for meals (Trial Transcript, p. 68) under instructions not to discuss the case with anyone (Habeas Transcript, 4/5/79, p. 57). Petitioner's counsel specifically consented to this (Habeas Transcript, 4/5/79, pp. 95-96).

Accordingly, it was not error for the Court to allow the first alternate juror to disperse for meals. Further, no constitutional rights of Petitioner

were thereby violated. The claim for relief in paragraph 13 is without merit.

14.

Paragraph 14 complains that the jury was permitted to be separated without appropriate instructions. The jury was not separated except for first alternate Weinstein, whose separation was consented to by Petitioner as discussed in paragraph 13 above. The Court did give instructions to the jury at the inception of the trial (Trial Transcript, pp. 25-26) concerning the fact that they should not discuss the case with anyone, or among themselves before the proper time for deliberation. While the grounds for relief in paragraph 14 are not entirely clear, the Court is satisfied that Petitioner has shown no constitutional violation concerning instructions to the jury. Accordingly, the claim for relief in paragraph 14 is without merit.

15.

In paragraph 15, Petitioner alleges that "...juror Chester Geesling was not in fact excused from the jury...", that the record is inaccurate, and that his constitutional rights were violated because of this inaccuracy. This claim is erroneous factually. While the record does reflect that the Court inadvertently referred to juror Chester Greeson as "Geesling" (Trial Transcript, pp. 231-232),

the evidence at the habeas hearing established clearly that it was juror Chester Greeson who became ill and who was excused and replaced by first alternate Weinstein (Habeas Transcript, 4/5/79, pp. 82-83, 18-92). While it is not clear whether this inaccurate reference to the juror's name is a result of a misstatement by the judge or a mistake of the court reporter, the inaccuracy in the transcript is of no consequence as far as any substantial constitutional rights of Petitioner are concerned. Petitioner has neither alleged nor demonstrated how he has been harmed by this inaccurate spelling of the excused juror's name in the transcript.

The constitutional claim in paragraph 15 is without merit.

16.

In paragraph 16, Petitioner correctly points out that the opening statements and closing arguments of counsel were not transcribed and made a part of the record in this case.

This claim of Petitioner must be considered in the context of a motion for complete recordation of proceedings which was made by Petitioner and granted, after a fashion, by the trial judge prior to the trial. (See Trial Record, pp. 30; 37). The record and transcript of the trial and the evidence in this habeas proceeding are all silent on the question of whether the opening statements and closing arguments

were taken down by the court reporter. There is no doubt that they were not transcribed and made a part of the record which was sent to the Supreme Court upon the direct appeal of this case. Petitioner has produced no facts to show harm resulting from this omission.

In the absence of a showing of harm, the law does not appear to require transcription of closing arguments, even in capital cases. Ga. Code Ann. §27-2401; Stephens v. Hopper, 241 Ga. 596, 600 (1978). The burden is on Petitioner to show that he was harmed and to produce a record to substantiate the claim. Bowden v. Zant, 244 Ga. 260, 262 (1979). Even where the Defendant in a capital case has made a motion for complete recordation of proceedings, he must be able to show that he has been harmed by the failure of the court reporter to include a transcription of arguments before relief will be granted because of such failure. Davis v. State, 242 Ga. 901, 902, 903(1) (1979).

The Court finds as a matter of fact that Petitioner has failed to produce evidence showing harm as a result of the absence of a transcription of the closing arguments. Accordingly, under Stephens, Bowden, and Davis, his claim for relief must be rejected.

However, there is another issue: Whether the due process clause of the Fourteenth Amendment to the United States Constitution requires more. Obviously,

the Supreme Court of Georgia was aware that the closing arguments were not sent to it with the record and transcript on direct appeal when it conducted its sentence review and concluded that the sentences of death were not handed down under the influence of passion, prejudice, or any other arbitrary factor. Consequently, this habeas corpus court deems this issue as one having been implicitly decided by the Supreme Court of Georgia when it affirmed the sentences of death in this case on direct appeal. See Peek v. State, 239 Ga. 422, 430, 431, 432 (1977).

For whatever it is worth, however, this Court observes that a capital sentencing system cannot comport with the Sixth, Eighth, and Fourteenth Amendments where the record and transcript of the proceedings are so incomplete that a reviewing court could not possibly determine that all of the requirements laid down in Gregg v. Georgia, 428 U.S. 153, 49 L. Ed. 2d 859 (1976), and its progeny, have been complied with. To place the burden on an indigent defendant to produce a complete record (see Bowden v. Zant, supra) and show that he was harmed by the failure of the court reporter to transcribe and send to the appellate courts a complete recordation of all proceedings (including arguments) is unrealistic. The court reporter works for the Court. Where defense counsel makes a motion for complete recordation of all proceedings

(as was done in this case) and it is not done, the defendant (whether he is indigent or otherwise) has done all he can do. It seems to this Court that it is not asking too much to require a complete transcript of everything that is said (including bench conferences)[2] be sent to the appellate courts for review when a death penalty has been imposed. The burden should be on the Court to see that all of this is done properly. In the view of this Court, due process and the spirit of Gregg v. Georgia should require complete recordation, especially when a motion for same has been made. The rule should be that the due process clause of the Fourteenth Amendment requires that a death sentence be set aside when a motion for complete recordation is made and the transcript is incomplete, unless the State comes forward and shows that no harm resulted because of the omissions. To place the burden on the defendant (as Stephens, Bowden, and Davis, do) is, in effect, to make the Motion for Complete Recordation a meaningless gesture. If the State of Georgia is to inflict the death penalty on its citizens, it is not asking too much to require that the system be sufficiently competent to furnish a complete record of the proceedings, especially where the defendant specifically asks for it.

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[2] The conference among the Judge, District Attorney, and Defense Counsel which resulted in substitution of the sick juror with the first alternate, was likewise not taken down and transcribed by the Court Reporter (see Par. 9, 10, 11). However, evidence at the habeas hearing established sufficient facts in this regard for the Court to conclude that Petitioner was not harmed, in a legal sense, because of an incomplete transcript.

This Court feels that Petitioner in this case should get a new trial because of this. But a habeas court must follow the law - not make law - and the present state of the law requires this Court to deny relief to Petitioner. See Davis v. State, supra.

This Court hopes the Supreme Court will adopt a rule similar to the one set forth above and reverse this Order. Justice would be well served if it would.

17.

Paragraph 17 raises a Witherspoon question. The transcript shows that two jurors were excused because of their conscientious opposition to capital punishment. (Trial Transcript, pp. 6-7; 15). Both of these prospective jurors were properly stricken for a cause under Witherspoon. Any further constitutional claim in this paragraph is without merit.

18.

In paragraph 18, Petitioner claims his constitutional rights were violated because the circumstances surrounding the removal of juror Greeson and the substitution of first alternate Weinstein were not included in the transcription of the case. Paragraph 18 further alleges that the alternate was "unsequestered". This is factually incorrect, as the alternate was sequestered at the proper time. (Habeas Transcript, 12/14/79, p. 14).

This paragraph has been covered by preceding paragraphs and the ruling of the Court on them. Accordingly, paragraph 18 is found to be without merit.

19.

In paragraph 19, Petitioner claims his constitutional rights have been violated by the failure of the prosecution to reduce a statement allegedly made by the defendant to writing "...until the day prior to trial..." and by the prosecutor's refusal to grant access to the murder weapon until the day prior to trial. The Court is unaware of any provision of law which would require the State to reduce a statement to writing at any time or to grant access to the murder weapon on the day prior to trial or on any other day. Petitioner has produced nothing in support of the allegations of paragraph 19, and the Court finds such allegations to be without merit.

20.

Paragraph 20 claims that the charge of the Court during the sentencing phase of the trial violated his Eighth and Fourteenth Amendment rights. Specifically, Petitioner claims that the Court failed to tell the jury that they could recommend a life sentence even though they had determined that

statutory aggravating circumstances had been proven.

While certain aspects of the Court's charge[3] are somewhat unclear, the entire charge, including the questionnaire sent to the jury room (Trial Record, pp. 55-57) meets the test of Spivey v. State, 241 Ga., 477, 481 (1978). Accordingly, the claim for relief in paragraph 20 is without merit.

21.

See paragraph 16.

22. and 23.

Paragraphs 22 and 23 complain that the Court did not instruct the jury to consider specific mitigating factors during the sentencing phase of the trial. The law does not require such instructions. Thomas v. State, 240 Ga. 393 (1977); Potts v. State, 241 Ga. 67 (1978); Spivey v. State, supra.

24.

Paragraph 24 claims that Petitioner's constitutional rights were denied him because the

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[3] "However, it is not essential to your decision that you find extenuating or mitigating facts and circumstances on the one hand, or facts and circumstances in aggravation on the other. Please do not confuse this with the charge which I shall give you a little bit later insofar as statutory aggravating circumstances may be concerned." [Trial Transcript, p. 235].

jury did not have complete information concerning his life and circumstances before it sentenced him. The case of Lockett v. Ohio, 57 L. Ed. 2d 973 (1978), cited by Petitioner, held that a capital sentencing statute was unconstitutional if it restricted the right of a defendant to introduce evidence in mitigation of punishment. Nothing in Lockett requires that any particular information be furnished. There is nothing in the record of Petitioner's case to indicate that the Court restricted him in any effort to place mitigating evidence before the jury.

Paragraph 24 is without merit.

25.

Paragraph 25 complains that Petitioner's due process rights were denied him because the trial lasted one day and was concluded in the early morning hours. The transcript of the trial indicates that the trial judge fairly gave the jury the option to retire for the evening and that they voluntarily elected to proceed to a verdict that night. (Trial Transcript, pp. 230-231). Counsel did not object to this action, and Petitioner has not shown any resulting harm. Accordingly, Petitioner has shown nothing to substantiate his claim that he was denied due process because of any of these matters. Paragraph 25 is without merit.

26.

Paragraph 26 has already been decided adversely to Petitioner upon the sentence review conducted by the Supreme Court of Georgia in Peek v. State, 239 Ga. at 430-433.

27.

The claim raised in paragraph 27 has already been decided adversely to Petitioner by the Supreme Court of Georgia in the sentence review portion of the opinion in Peek v. State, at 430-433.

28.

Paragraph 28 is a broad attack on the constitutionality of the death penalty. The Georgia death penalty statute has been declared constitutional. Gregg v. Georgia, 428 U.S. 153, 49 L. Ed. 2d 859 (1976).

29.

Petitioner has offered no evidence or argument in support of paragraph 29, and it is deemed abandoned. The Court is unable to read paragraph 29 and understand the point urged sufficiently to make further comment.

30.

In paragraph 30, Petitioner claims that his constitutional rights were denied him when the trial court charged on aggravating circumstances when the State had offered no evidence of aggravating circum-

stances during the sentencing phase of the trial. This claim for relief is without merit because the Court properly instructed the jury that they could consider evidence submitted during both phases of the trial in determining what sentence would be imposed. (Trial Transcript, p. 235). It is not required under Georgia's capital sentencing statute that notice of anything other than prior convictions be given the defendant prior to trial, and the Court is charged with the duty of charging the jury that it may consider any aggravating circumstances that are raised by the evidence. This was done by the Court in Petitioner's case. See Bowden v. Zant, 244 Ga. 260, 263-264 (1979).

31.

In paragraph 31, Petitioner alleges that his constitutional rights were denied him because the trial judge made improper remarks to the jury concerning the failure of the Petitioner to testify or present evidence on his own behalf. Petitioner cites "transcript, p. 245". That page of the transcript is a part of the Court's sentencing of Petitioner, and the Court cannot find in the transcript what Petitioner alludes to in paragraph 31. Petitioner did testify in his own behalf (Trial Transcript, pp. 184-210).

What Petitioner may be talking about is a remark made by the trial judge during his charge

to the jury during the sentencing phase of the trial:

> "You are authorized to consider the facts and circumstances if any in extenuation, mitigation, or aggravation of punishment which may have been submitted to you. And of course, no evidence was submitted, but you do have the arguments of the district attorney for the State and Mr. Ashley as counsel of record for the defendant." (Trial Transcript, p. 235).

This was not comment on Petitioner's failure to testify but rather on the fact that neither the prosecution nor the defense presented any additional evidence during the sentencing phase of the trial.

Paragraph 31 is without merit.

32.

This is the same claim made in paragraph 20. It is without merit for the same reasons expressed by the Court concerning paragraph 20.

32. [Second Paragraph 32]

This paragraph is another attack on the constitutionality of Georgia capital sentencing system. It is without merit for reasons previously indicated.

33.

See paragraph 30.

34.

Paragraph 34 is unclear to the Court, but it appears to assess constitutional deprivation because Petitioner was not placed on notice in advance of trial what the aggravating circumstances might be so as to provide a basis for the imposition of the death penalty. This claim is without merit. See Bowden v. Zant, 244 Ga. 260, 263-264 (1979).

35.

See paragraph 17.

36.

Paragraph 36 claims constitutional deprivation because the jury did not reflect a representative cross-section of the community but was biased in favor of the prosecution. Petitioner has produced no evidence and made no argument in support of this proposition, and it is found to be without merit. See Spinkellink v. Wainwright, 378 F2d 582 (5th Cir. 1978).

37.

Paragraph 37 alleges that Petitioner was sentenced to die by a jury which was selected by unconstitutional procedures. He has produced no evidence and made no argument in support of this

position, and it is found to be without merit.

38.

Petitioner's final allegation is that his counsel at trial failed to render effective assistance, thereby depriving Petitioner of his rights as guaranteed by the Sixth and Fourteenth Amendments. Petitioner alleges numerous specific instances of ineffective assistance. Although the trial judge, prosecutor, and Petitioner's trial counsel have testified in the habeas proceeding, only a small amount of evidence or testimony specifically directed at this issue has been submitted besides the trial record and transcript.

The standard for evaluating the effectiveness of counsel in Georgia is "...not errorless counsel, and not counsel judged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance." MacKenna v. Ellis, 280 F. 2d 592 (5th Cir. 1960), Pitts v. Glass, 231 Ga. 638 (1974). Disagreements about trial strategy and tactics do not require a finding of ineffectiveness. Reid v. State, 235 Ga. 378, 379 (1974), see Hawes v. State, 240 Ga. 327, 329-330 (1977). Effectiveness, in part, may be evaluated against the facts of the case. Dobbs v. State, 235 Ga. 800, 804 (1976).

The Court finds that no evidence has been introduced to substantiate the contents of the following allegations:

(1) Failure to cooperate with subsequent counsel.

(2) Failure to investigate the murder weapon.

(3) Failure to investigate and interview witnesses prior to trial.

(4) Failure to challenge array of grand and traverse juries.

(5) Failure to invoke the rule of sequestration.

After examining the evidence submitted, the Court finds the following allegations to be permissible trial tactics or strategy:

(1) Conducted a most perfunctory voir dire of prospective jurors. Counsel knew most of the traverse jurors called. (Motions Hearings, p. 26).

(2) Failure to object to the exclusion of jurors with conscientious scruples about the death penalty. Counsel is presumed to know the Witherspoon requirements, which the Court has examined in an earlier paragraph of the petition.

(3) Failure to object to dispersal of the jury, i.e. to object to Weinstein eating at home. (See Habeas Transcript 4/5/79, at p. 96).

(4) Agreed to permit substitution of an alternate when a juror became ill. (See Habeas Transcript 4/5/79, at pp. 92-95).

(5) Failure to introduce evidence in mitigation. Counsel did argue on behalf of Defendant. (Trial Transcript, p. 234).

(6) Failure to raise the defense of insanity. Defendant raised the defense of alibi, with some

indication of self-defense being raised.

(7) Failure to object to post-midnight proceedings. The trial judge questioned the jury, and it was the jury's decision to continue. (Trial Transcript, pp. 230-231).

(8) Waiver of three days' notice of arraignment. Counsel announced ready for trial without the three extra days. (Motions Hearings, p. 23).

(9) Failure to elaborate on "rumblings" by traverse jury. Counsel apparently did not want the defense to appear dilatory in the perceptions of proposed jurors. (See Motions Hearings, p. 23).

(10) Failure to move for a change of venue. No suggestion has been made that a fair and impartial jury could not have been obtained or was not obtained.

(11) Failure to poll the jury. Counsel told of adverse experiences in that circuit when juries were polled. (Habeas Transcript, pp. 109-110).

(12) Failure to introduce evidence at pre-trial motions hearings. Counsel did obtain substantial results by the conduct of the proceedings on motions. No showing has been made that evidence was available or that Defendant could have further prevailed by introducing evidence.

The following allegations are factually incorrect, and are not indicia of ineffective assistance.

(1) Failure to demand transcription of opening and closing remarks by the prosecutor. Counsel moved for complete recordation. He did all he could do. (See par. 16 above).

(2) Failure to object to improper charges and to the Court's comment on failure to produce evidence. This Court has examined each of the two enumerations and finds no improper conduct on the part of the trial court as Petitioner alleges.

Therefore, based upon the above, the Court finds the allegations of ineffective assistance to be without merit.

CONCLUSION

Having examined each paragraph of the Petition and finding no constitutional infirmity concerning Petitioner's convictions and sentences, the Petition is denied.

So Ordered, this 31st day of March, 1980.

R. ALEX CRUMBLEY, JUDGE SUPERIOR COURTS, FLINT JUDICIAL CIRCUIT

file room nbm

80-5644

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PEEK V. ZANT

SUPREME COURT OF GEORGIA

ATLANTA, August 1, 1980

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

DAVID PEEK V. WALTER D. ZANT, WARDEN

Upon consideration of the Motion for Reconsideration filed in this case, it is ordered that it be hereby denied.

SUPREME COURT OF THE STATE OF GEORGIA,

CLERK'S OFFICE, ATLANTA,

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Hazel E. Hallford, Deputy Clerk.

APPELLATE REVIEW BY THE GEORGIA SUPREME COURT OF THE DENIAL OF STATE HABEASES

Chronology

CASE	CERT. PROB. CAUSE GRANTED/DENIED	DENIAL OF HABEAS AFFIRMED/REVERSED	DATE HAB. DEN. AFF'D/P.C. DEN.
McCorquodale	Granted	Affirmed	5-10-77
House	Granted	Affirmed	6-7-77
Mitchell	Granted	Affirmed	9-7-77
Smith, John	Granted	Affirmed	10-18-77
Ross	Granted	Affirmed	11-29-77
Dungee	Granted	Affirmed	4-19-78
Isaacs	Granted	Affirmed	4-19-78
[1]Gregg	Denied		4- -78
Stephens	Granted	Affirmed	7-22-78
Moore, William	Denied		8- -78
[2]Berryhill	Granted	Affirmed	9-28-78
Mason	Denied		10-3-78
Young, Charlie	Granted	Affirmed	10-24-78
[3]Banks, 2nd Trial	Granted	Affirmed	11-7-78
Jarrell	Granted	Affirmed	11-7-78
[4]Goodwin	Granted	Affirmed	2-6-79
[5]Harris	Granted	Reversed	2-27-79
Spencer	Granted	Affirmed	4-4-79
[6]Spivey	Denied		4-24-79
Corn	Granted	Affirmed	7-9-79
Smith, Rebecca	Denied		7-11-79
[7]Alderman	Denied		9-5-79
Bowden	Granted	Affirmed	9-6-79
Stanley	Denied		9-6-79
Thomas	Denied		9-6-79
[8]Chenault	Granted	Affirmed	10-4-79
[9]Gibson	Granted	Affirmed	10-16-79
Blake	Denied		10- -79
Moore, Carzell	Denied		12-5-79
Drake	Denied		1-25-80
Dix	Denied		2- -80
Dobbs	Denied		2-20-80

"EX. B"

CASE	CERT. PROB. CAUSE GRANTED/DENIED	DENIAL OF HABEAS AFFIRMED/REVERSED	DATE HAB. DEN. AFF'D/P.C. DEN.
Westbrook	Denied		2- -80
[10]Campbell	Granted	Reversed	3-5-80
Presnell	Denied		3-19-80
Finney	Denied		5-8-80
Redd	Denied		7-2-80
Peek	Denied		7-16-80
Amadeo	Denied		9-9-80

Annotations:

[1]Gregg: Certificate of Probable Cause Denied for obvious reasons!

[2]Berryhill: Case subsequently reversed by Judge Harold Murphy, Northern District of Georgia, Rome Division. Conviction and sentence reversed because of the use, at trial, of an illegal confession. Miranda and right to have counsel present at interrogation. 5-13-80. State has appealed to Fifth Circuit.

[3]Banks, 2nd Trial: Case subsequently reversed by Georgia Supreme Court, on Extraordinary Motion for New Trial. Conviction and sentence reversed. Banks originally was sentenced to death on 1-31-75, conviction and sentence reversed by Georgia Supreme Court on 9-12-75. A second trial was held; he was death sentenced again on 11-18-75. It is this conviction and sentence that have again been reversed. 6-9-80.

[4]Goodwin: Case presently before Judge Wilbur Owens, Middle District of Georgia, Macon Division. Magistrate's Proposed Findings of Fact and Conclusions of Law recommend reversal of the death sentence on trial judge's failure to charge on mitigating circumstances. 8-18-80.

[5]Harris: Denial of state habeas reversed by Georgia Supreme Court from the bench, on failure of trial judge to charge that life could be imposed, even if a statutory aggravating circumstance was found. Fleming-Hawes-Spivey grounds. Resentencing trial ordered. Life sentence given by jury. 2-27-79.

[6]Spivey: Certificate of Probable Cause denied, no doubt, because of need to avoid ruling on the validity of the Spivey charge. If Spivey charge falls, so do about 50% of all the other charges which have passed muster so far. Spivey is presently at the Fifth Circuit, no argument date has been set.

[7]Alderman: Case subsequently reversed by Judge Avant Edenfield, Southern District of Georgia, Savannah Division. Conviction and sentence reversed; sentence on Witherspoon grounds, conviction on Hale-Doyle-Miranda grounds. 9-9-80. State has appealed to Fifth Circuit.

[8]Chenault: Certificate of Probable Cause granted, no doubt, because of the Fifth Circuit ruling in Chenault v. Stynchcombe, 581 F.2d 444 (5th Cir. 1978). Ruling did not address charge issue because of failure to exhaust state remedies. The Fifth Circuit hinted strongly, however, that the charge might be deficient.

[9] Gibson: Certificate of Probable Cause granted, no doubt, because of Fifth Circuit ruling in Gibson v. Jackson, 443 F.Supp.239 (M.D. Ga., vacated, 578 F.2d 1045 (5th Cir. 1979). In Gibson, Judge Wilbur Owens held that a death-sentenced indigent had a right to appointed counsel in state habeas proceedings. The Fifth Circuit reversed and remanded, essentially on abstension grounds, indicating that this issue had not been addressed by the state courts. Judge Alex Crumbley, Flint Judicial Circuit, appointed counsel to represent Gibson. I think that I am correct that the Georgia Supreme Court did not address this issue in Gibson v. Zant, 244 Ga. 482. They did, however, address it adversely in Davis v. Hopper (or Balkcom), ___ Ga. ___, #36074, decided July 16, 1980, holding that a death-sentenced indigent was not entitled to appointed counsel, thus reversing Judge John R. Harvey, Atlantic Judicial Circuit, who had granted Davis' Motion to Appoint, in part granted on equal protection grounds because of Judge Crumbley's actions in Gibson.

[10] Campbell: Application for Certificate of Probable Cause filed by State and Defendant. Judge Alex Crumbley, Flint Judicial Circuit, had reversed the death sentence, using logic to interpret the verbal hand-slapping which the Georgia Supreme Court has given to prosecutors who used Eberheart/Hawkins references in their closing arguments in the penalty phase of the trial. Judge Crumbley found the arguments to be prejudicial and passion-arousing. The Georgia Supreme Court disagreed, and re-imposed the death sentence, while also affirming the conviction.

Cm 8

NO. 80-5644

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

ORIGINAL COPY

DAVID PEEK,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

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10

QUESTIONS PRESENTED

1.

Does Georgia law provide an adequate procedure for the raising, reviewing, and disposition of constitutional issues in habeas corpus?

2.

Does the failure to transcribe closing argument present a ground for habeas corpus relief?

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Ga. Code § 27-2401. 3

NO. 80-

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

DAVID PEEK,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

PART ONE

STATEMENT OF THE CASE

Petitioner, David Peek, was convicted on two counts of murder and one count of kidnapping in the Superior Court of Greene County, Georgia; he received death sentences on all counts. On direct appeal his convictions were affirmed, as were the death penalties imposed for the murder counts. Peek v. State, 239 Ga. 422, 238 S.E.2d 12 (1977), cert. denied 439 U.S. 882 (1978).

The facts of this case have been before this Court earlier and are fully recounted in the opinion of the Supreme Court of Georgia. Briefly, Petitioner beat Grady Peek, Jr., and James Jones to death with a blunt instrument and kidnapped and raped their companion, Pearlie Mae Lawrence. Afterward, Petitioner denied any involvement in the murders, claiming that two other persons had beaten the victims with a baseball bat and stabbed one with a knife. Autopsies indicated that neither victim was killed by a baseball bat or a knife. 239 Ga. at 422-24.

PART TWO

REASONS FOR NOT GRANTING THE WRIT

I. GEORGIA LAW PROVIDES AN ADEQUATE PROCEDURE FOR THE RAISING, REVIEWING AND DISPOSITION OF CONSTITUTIONAL ISSUES IN HABEAS CORPUS.

The first and third issues which Petitioner seeks to present to this Court are in reality a single challenge to the adequacy of Georgia's habeas corpus procedures. If, as Petitioner suggests, the review conducted by the state courts was woefully inadequate, then the case is in no such posture to allow this Court to conduct a satisfactory review. Of course, as Petitioner acknowledges, the lack of full and fair state court proceedings is an issue which he may raise and litigate in federal habeas proceedings; indeed, if the review provided Petitioner was neither full nor fair, the appropriate federal district court is bound to provide a second forum. Townsend v. Sain, 372 U.S. 293 (1963).

Furthermore, it does not appear that the adequacy of post-conviction review in Georgia has been timely raised or appropriately developed by Petitioner; therefore, nothing in Petitioner's allegations 1 and 3 provides an issue for this Court to consider or decide.

II. THE FAILURE TO TRANSCRIBE CLOSING ARGUMENT PRESENTS NO GROUND FOR HABEAS CORPUS RELIEF.

In his second allegation, Petitioner contends that the lack of a transcription of the closing argument in his case mandates review and, ostensibly, vacating his death penalty.

The evidence presented in this case is that Petitioner's trial attorney made a motion for complete recordation which was granted by the trial court. However, the closing argument at trial was not transcribed and made part of the record on appeal. That the closing argument was not transcribed does not mean it was not recorded. However, Georgia law does not require such transcription, unless error is alleged. The state habeas court correctly applied state law:

> In the absence of a showing of harm, the law does not appear to require transcription of closing arguments, even in capital cases. Ga. Code Ann. § 27-2401;[1/] Stephens v. Hopper, 241 Ga. 596, 600 [247 S.E.2d 92](1978).

[1/] Ga. Code § 27-2401 provides in part as follows:

> On the trial of all felonies the presiding judge shall have the testimony taken down, and, when directed by the judge, the court reporter shall exactly and truly record, or take stenographic notes of, the testimony and proceedings in the case, except the argument of counsel. . . . (emphasis supplied).

Additionally, Ga. Code § 6-805(d) provides:

> Where a trial in any civil or criminal case is recorded by a court reporter, all motions, colloquies, objections, rulings, all evidence-whether admitted or stricken on objection or otherwise-copies or summaries of all documentary evidence, the charge of the court, and all other proceedings which may be called in question on appeal or other post-trial procedure shall be reported, and where the report is transcribed, all such matter shall be included in the written transcript . . . .

> The burden is on Petitioner to show that he was harmed and to produce a record to substantiate the claim. Bowden v. Zant, 244 Ga. 260, 262 [260 S.E.2d 465] (1979). Even where the Defendant in a capital case has made a motion for complete recordation of proceedings, he must be able to show that he has been harmed by the failure of the court reporter to include a transcription of arguments before relief will be granted because of such failure. Davis v. State, 242 Ga. 901, 902, 903(1) [252 S.E.2d 443] (1979).
>
> The Court finds as a matter of fact that Petitioner has failed to produce evidence showing harm as a result of the absence of a transcription of the closing arguments. Accordingly, under Stephens, Bowden, and Davis, his claim for relief must be rejected.

(Order of state habeas court at 8). [Petitioner has submitted an accurate copy of the habeas court's order with his petition and Respondent will not burden this Court's record with an additional exhibit].

In Stephens v. Hopper, supra, the Supreme Court of Georgia said, "We are unable, however, to accept the proposition that the failure to transcribe the closing arguments of counsel requires the death penalty automatically to be set aside." Id. at 600-01. As previously noted, had there been objectionable argument made during closing argument, upon objection by counsel

Georgia law requires such potentially objectionable argument to be transcribed. In the present case, it is apparent that there was no argument to which objection was made, since it would have been made part of the record by state law.

Furthermore, Petitioner has had ample opportunity, even without transcription, to make some showing that closing argument contained objectionable material. Yet the strongest argument Petitioner can make is "[t]here is always a possibility of inflammatory or prejudicial remarks during closing arguments in a case." (Petitioner's brief at 14). Respondent is aware of no case in which speculation without foundation has established error sufficient to warrant reversal. On the contrary, both state and federal law require some showing beyond mere possibility of error. Petitioner in this case has had not only the burden but the opportunity to establish error and has chosen to make no effort to do so. Indeed, absent transcription, it is to Petitioner's benefit to speculate and rely on mere possibility.

Petitioner had the opportunity to take the witness stand and testify whether passion, prejudice, race, possibility of parole, or any other improper argument was made. He did not do so. The trial attorney was present at the habeas corpus hearing; neither did Petitioner inquire of the trial attorney whether he recalled any improper argument having been made. Not making such inquiry is understandable, particularly since the trial attorney presumably would have objected initially during trial had improper argument been made. The district attorney was called as a witness in the habeas corpus proceedings, yet Petitioner chose not to delve into the subject of closing argument with him. Finally, the trial judge was deposed at length by counsel for Petitioner and Respondent; again, Petitioner apparently chose to abandon any attempt at evidentiary development on the issue of closing argument.

Thus, all four principal participants in the trial - the defendant, the trial attorney, the district attorney, and the trial judge - were made available [2/] and each could have testified whether improper argument was made during trial. Even with the witnesses available, including Petitioner himself, absolutely no showing whatsoever has been made that closing argument was improper in any regard. This, coupled with the absence of any objection at trial to argument, leaves but one reasonable conclusion: there was no improper closing argument.

Thus, Petitioner's allegation that, in effect, error must be assumed, is not meritorious. Second, his argument that placing the burden upon him to establish error is unfair, apparently because of his indigency, is likewise without merit because every person who could have assisted Petitioner in carrying his burden was present at no expense to Petitioner and, in what must be assumed a tactical decision, Petitioner chose not to attempt to carry his burden either by examining the witnesses on the issue of closing argument or by taking the witness stand himself.

Petitioner has presented no ground warranting this Court's granting of the writ; the petition should, therefore, be denied.

[2/] It should be noted that the witnesses appeared and testified without expense to Petitioner.

CONCLUSION

For the foregoing reasons the petition for writ of certiorari should be denied.

Respectfully submitted,

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